8

In the United States Circuit Court of Appeals

For The Ninth Circuit

M. G. HENRY,
Plaintiff in Error,
vs.
TACOMA RAILWAY & POWER COMPANY, a corporation,
Defendant in Error.

No. 2453

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF DEFENDANT IN ERROR

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ARGUMENT.

SPECIFICATIONS I, II AND IX.

Plaintiff in error has submitted without argument his specifications of error number I, II, and IX, and we will therefore not refer to them, except to suggest to the court that these questions were di-

rected only to the amount of damages, if any, sustained by the plaintiff. The verdict for the defendant exonerated it from liability and precluded all inquiry into the question of damages. If any error was committed, and we contend that the court did not err in its ruling, this was rendered immaterial and of no prejudice to the plaintiff by the verdict.

SPECIFICATIONS IV AND V.

These specifications of error are subject to the same criticism as stated in reference to specifications I and II. The only probative value they possessed was directed to the question of the amounts of damages. Counsel for plaintiff making his offer of proof on these very questions stated,—

"I offered to prove that as bearing upon the measure of damages." Trans., p. 68.

Plaintiff has confused his argument under these assignments by attempting to argue his assignments VI and VII. We, therefore, refrain from arguing assignments VI and VII, under these specifications.

SPECIFICATIONS VI AND VII.

Under these specifications plaintiff complains of the remarks of the trial judge in ruling upon an offer of what counsel for plaintiff expected to prove by one of his witnesses. The part of the offer to which the exception was taken was as follows:

"Matters have progressed to a point where they have had to carry Mr. Henry for some time,—more as an act of charity than otherwise."

The attempt of the counsel to inject into the case any reference to plaintiff's financial condition was objectionable and the court acted clearly within its discretion and performed its duty when it attempted to reprimand counsel for the offer. The court said that counsel had no business to make the offer in the form that he did, and we believe this court will agree with the trial judge in that matter.

Plaintiff further complains of the statement:

"There was nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far it has been shown that he carries others around on pleasure excursions himself."

There was, as the court correctly states, no evidence which would even justify counsel for plaintiff to state in the presence of the jury that the plaintiff was being carried as an act of charity by the corporation in which he was a substantial stockholder. He testified that he was the owner of a motorcycle, and a launch which he operated on Lake Washington; that after he became a member of the bonding corporation of Tacoma he bought an automobile, in January, 1912. That was a four-passenger car. Early in 1913, he bought a larger automobile. He also testified that he had driven up to the Mountain from Tacoma eight or nine times, as far as the Glacier. Just a month before the trial he took a couple of clients up there and back. (Trans., p. 52.) The reading of the Transcript will also show that he made various excursions to a great

many parts of the state. The evidence discloses that he had taken Mr. Murray for an automobile ride through the southwestern part of the state. (Trans., p. 62.) That he took one of his witnesses, Mr. Keagy, for a trip to the Mountain. One place on the road there was a sheer drop of several hundred feet from the edge of the road. (Trans., p. 63.) And Mrs. Henry testified about various automobile excursions, and the testimony at the time the court's remark was made, showed that plaintiff was in the habit of taking different members of his firm back and forth to their homes, morning and evening, in his automobile. And we further call the court's attention to the testimony of Mr. J. W. Roberts, who was a student conductor employed by the defendant at the time of the accident, but who was subsequently discharged by the company for shortage in fares. Mr. Roberts testified that the plaintiff came to see him after he was discharged; and further said that "plaintiff had told him something about a trip he was going to take around the world, that the doctors advised him to take. Plaintiff told him about a year ago that he had got his (plaintiff's) ticket for a trip around the world, and also had a lady nurse hired to go with him, but as plaintiff got sick or worse, it was impossible for him to go at that time, so he told the witness he had made up his mind to go now. Plaintiff had told him two or three weeks before the trial. Plaintiff told him that when the case was over he was thinking of taking his automobile and the witness and driving from

Tacoma to San Francisco, and taking the boat there. Plaintiff had asked the witness if he would go with him and witness told him he would. Plaintiff had then said he would write to the mother of the witness and ask her opinion about it. He did and she consented. Plaintiff had said from the time they left until they got back, the trip would last eight or ten months. Plaintiff was going to take his automobile on the boat." (Trans., pp. 89-90.)

The testimony offered by the plaintiff was of such a nature that it absolutely negatived any idea of anybody carrying plaintiff as an act of charity. The court furthermore, after addressing its remarks to counsel, instructed the jury that they were the sole and exclusive judges of the facts in every case from the evidence, giving the jury to understand that the remark was made not to influence them in any way in arriving at their conclusion as to the facts. After the remark complained of the court said to the jury. "You are the sole and exclusive judges of the facts in every case from the evidence." (Trans., p. 69.) And the court in its final instructions to the jury instructed them as follows:

"You are, in this case as in every other case where questions of fact are submitted to the jury for their determination, the sole and exclusive judges of every question of fact in the case and the weight of the evidence and the credibility of the witnesses." (Trans., p. 111.)

Plaintiff quotes at some length the case of *Peterson v. Pittsburg, etc., Mining Co.*, 140 Pac. 519, in support of his contention, but it will be noticed that although the remarks of the court in that case were of a more prejudicial character than those complained of in this case, the court refused to reverse the case for that reason, saying,—

"While it may be reasonable to assume that remarks of the trial judge, such as those camplained of in this case, may have an influence prejudicial to one or the other side of the case, yet, in view of the rule that the party who alleges error must establish the same clearly, we would not disturb the judgment in this case by reason of the errors assigned with reference to the remarks of the trial court. *McMahon v. Eau Claire*, 95 Wis. 640, 70 N. W. 829."

In the cases of *Cronkhite v. Dickerson*, 116 N. W. 371, and *Monier v. Phil. Rapid Trans. Co.*, 75 Atl. 1070, cited by plaintiff, no question of any reflection on an attorney tending to bring him in disrepute was involved, and in all cases cited by plaintiff the facts are so different as to be of little or no value in considering the matters complained of in this case.

In the action for damages evidence of the plaintiff's poverty is irrelevant, and it would have been reversible error for the court to have permitted the plaintiff to show that he was being carried as an act of charity, or would be soon so carried.

Pa. R. Co. v. Roy, 102 U. S. 451; 26 L. Ed. 141.

Alabama G. S. R. Co. v. Carrol, 84 Fed. 772.

National Biscuit Co. v. Nolan, 138 Fed. 6.

Dallas, etc., St. Ry. v. Summers, 106 S. W. 891.

Griser v. Schoenborn, 123 N. W. 823.

So. Ry. Co. v. Phillips, 71 S. E. 414.

Riverside & Dam River Cotton Mills Co. v. Carter, 74 S. E. 183.

Kelley v. Southern Wis. Ry. Co., 140 N. W. 60.

15 Cen. Dig., Damages, §498.

7 Dec. Dig., Damages, §171.

The Supreme Court of the State of Washington recently held in the case of *State v. Neis*, 74 Wash. 280, that where the remarks of the trial judge in ruling upon an offer of evidence were brought about by counsel's offer, which contained improper evidence, the party so offering the improper evidence could not object to the court's commenting upon the same.

It will be noticed that the offer of evidence followed the questions to which the court had sustained objections. There was no offer to prove anything in addition to what was indicated by the questions upon which the court had already ruled, except as the offer relates to the plaintiff as an object of charity. Nothing could be gained by plaintiff by making the offer except to suggest to the jury that Henry was an object of charity. The court had a right and it was its duty to confine counsel within proper limits and to prevent him

from persistently endeavoring to draw out evidence from the witness after the rulings of the court that the same was improper.

In *Hein v. Mildebrandt*, 115 N. W. 121, the court said,—

"Error is also assigned because of language used by the court in a colloquy between the court and counsel for appellant. The language complained of was an admonition coming from the court to the effect that after the court had ruled twice with reference to a certain question it was unprofessional and uncourteous for appellant's counsel to persist in putting the question for the purpose of procuring an answer considered improper by the court, and that counsel had the record covering the point completely, and that he must not offend in that way again. It appears from the record that counsel did persist in putting substantially the same question several times in succession after it had been ruled improper. Without prolonging the discussion upon this point, we think it clear that there was no prejudicial error in the language used under the circumstances, but, on the contrary, that the purpose of the court was to confine counsel within proper limits, and to prevent him from persistently endeavoring to draw out evidence from the witness after rulings of the court that the same was improper."

It would require a wide stretch of the imagination to see how the attorneys for plaintiff could have been brought into contempt before the jury by the remarks of the court. We submit that the language used in the case of *Press Pub. Co. v. Monteith*, 180 Fed. 356, is very applicable to this case.

"The defendant realizing apparently that even upon its own presentation no serious error has been committed, invokes the archaic rule that if error be discovered, no matter how trivial, prejudice must be presumed. The more rational and enlightened view is, that in order to justify a reversal the court must be able to conclude that the error is so substantial as to have injuriously affected the appellant's rights. Prejudice must be perceived, not presumed or imagined."

If any error was committed by the court — and we maintain none was committed — it was cured by the subsequent instructions of the court.

"The expression of an erroneous opinion by the court to counsel during the discussion, altho in the presence of the jury, except in rare cases of obvious prejudice, cannot be ground of reversal, when the conclusion finally reached and carried into effect, either by ruling or on evidence, or instruction to the jury, is correct. *Gilchrist v. Brande*, 15 N. W. 817; *Stiles v. Neillsville Co.*, 58 N. W. 411; *Baker v. State*, 59 N. W. 570; *Owen v. Long*, 72 N. W. 364; *Brown v. Warner*, 93 N. W. 17."

McGowan v. City of Watertown, 110 N. W. 402.

An examination of the records in this case will disclose the fact that plaintiff was allowed the greatest latitude in the introduction of testimonly relative to plaintiff's physical condition, both before and after the accident complained of. The transcript of the evidence covers over 500 typewritten pages, and perhaps three-fourths of this amount concerns only the physical condition of the plaintiff, so that the jury were fully advised as to the

future ability of plaintiff to perform his usual duties, without resorting to speculation or conjecture.

VIII AND IX.

Under these specifications plaintiff maintained that the court erred in refusing to permit plaintiff to recall two witnesses for further cross-examination for the purpose of showing their interest in the result of the action. The transcript of record shows that on rebuttal plaintiff called the student conductor hereinabove referred to, J. Wesley Roberts, to testify in his behalf. Roberts is the student conductor to whom the plaintiff had offered an automobile trip around the world. Plaintiff did not introduce Roberts' testimony in his case in chief, but waited until defendant had introduced its testimony and then put on the student conductor as practically his last witness. This, we submit, was entirely out of order, but defendant raised no objection thereto. Plaintiff in his brief says that "Cross-examined by counsel for defendant this witness (Roberts) admitted that he had signed defendant's Exhibit 'G' preliminary to entering upon his employment with the defendant."

The record is absolutely silent as to what Exhibit "G" was. Plaintiff did not see fit to incorporate in his Bill of Exceptions any reference to this Exhibit "G" now complained of, and the defendant was deprived of any opportunity to make the purpose for which said Exhibit "G" was introduced apparent to the court. Defendant did not antici-

pate the use of this exhibit on any appeal of this case.

We respectfully call the court's attention to the Bill of Exceptions, including the testimony of the witness Roberts, as shown in the Transcript on pages 87-90, inclusive. If we might be permitted to go outside of the Transcript of Record, as the plaintiff has done, it would be shown by the Transcript of the Evidence that the witness Roberts had been discharged from the employment of the defendant Company, and that Mathieson, one of defendant's witnesses and the conductor in charge of the car, and who had also been discharged, at the solicitation of the plaintiff took the witness Roberts to plaintiff's office and plaintiff finally obtained his consent to testify as a witness for him. The Transcript of the Evidence would further show that on cross-examination Roberts denied having signed defendant's Exhibit "C," and denied that the signature attached thereto was his. Defendant then introduced several papers signed by the witness Roberts at the time he entered defendant's employment, including Exhibit "G," to show his signature only, and after the introduction of those exhibits Roberts admitted having signed Exhibit "C," which was his statement of the manner in which the accident occurred, and directly controverting his sworn evidence.

At the very close of the case plaintiff put Mr. Mathieson on the stand for the purpose of asking him whether he had ever signed an agreement sim-

ilar to Exhibit "G." The court did not permit this, holding that this was not rebuttal.

We respectfully submit to the court that the ruling was correct. Exhibit "G" was no part of defendant's case, but was merely introduced for the purpose of impeaching the testimony of the witness Roberts as to his signature on Exhibit "C." It was absolutely within the discretion of the court to refuse to permit plaintiff to further cross-examine the witnesses Mathieson and Olson in this regard, and the court did not abuse its discretion in that respect, especially in view of the fact that plaintiff failed and neglected to introduce the testimony of Roberts in his case in chief.

We maintain that, even though the two witnesses had signed such an agreement, it did not change their legal liability to the company for damages resulting from their negligence as servants and employes of the defendant, the rule of law being that the employe is liable to his employer for damages resulting to the employer from the employe's negligence in performing his work.

National Savings Bank of the District of Columbia vs. Ward, 100 U. S. 195; 25 L. Ed. 621.

Mobile & Montgomery Ry. Co. vs. Clanton, 31 Am. Rep. 15.

Navarre Hotel & I Co. vs. American Appraisal Co., 142 N. Y. S. 89.

Beard v. Horton, 5 Southern 207.

Willard v. Pinard, 44 Vt. 34.

Gilson v. Collins, 66 Ill. 136.

Century, Master & Servant, §74.

We wish to call the court's attention particularly to the instruction given by the court to the jury as follows:

"If you conclude that the defendant's servants who were in charge of the car may have had an interest, by reason of their relation to this accident, in the case, you should give weight to this in passing upon their credibility."

The court will furthermore find that the Transcript shows that Mathieson, who was discharged from the employment of the company, had done all in his power to assist plaintiff in obtaining the names of the witnesses that defendant had to the accident, and plaintiff did not contend in his complaint or during the trial that motorman Olson was guilty of any negligence toward defendant.

We, therefore, submit that the court did not abuse the sound discretion necessarily lodged in it in refusing to permit plaintiff to further interrogate Mr. Mathieson, and the record shows conclusively that Mr. Olson was never put upon the witness stand to testify, but plaintiff merely made the statement that he expected to put him on, which under all rules of evidence is insufficient upon which to predicate error.

No error was committed in the trial of the case as complained of by plaintiff, and we therefore request the court to affirm the judgment.

J. A. SHACKLEFORD,
F. D. OAKLEY.